

The Honorable John H. Chun

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FEDERAL TRADE COMMISSION,

No. 2:23-cv-0932-JHC

Plaintiff,

V.

AMAZON.COM, INC.,

**AMAZON.COM, INC.'S MOTION  
TO STRIKE IMPROPER  
COMPLAINT ALLEGATIONS**

**NOTE ON MOTION CALENDAR:  
August 4, 2023**

## I. INTRODUCTION

When a complaint contains allegations that are “far afield” from the “conduct and claims at issue,” those allegations should be struck. *Beasley v. Lucky Stores, Inc.*, 400 F. Supp. 3d 942, 963 (N.D. Cal. 2019). That is the situation here. The claims at issue in this case concern the sign-up and cancellation processes for Amazon Prime. ECF No. 1 at ¶¶ 249–66. Amazon looks forward to refuting the allegations supporting those claims during the course of this litigation.

This motion, however, addresses the parts of the FTC’s complaint that have nothing to do with the case. For example, the FTC devotes nearly eight pages of its Complaint to extraneous issues that purportedly arose during the FTC’s investigation. The FTC accuses Amazon of delaying that investigation, mischaracterizes the parties’ negotiations over document requests, and criticizes Amazon for asserting privilege over attorney-client communications. *Id.* at ¶¶ 221–41. The FTC also makes conclusory and immaterial allegations regarding non-Prime programs. *Id.* at ¶¶ 218–20. These allegations have nothing to do with the FTC’s claims or requested relief and appear to have been added “solely to prejudice [Amazon] by painting it as a

1 bad actor.” *Beasley*, 400 F. Supp. 3d at 963. Accordingly, the Court should strike these  
 2 allegations under Federal Rule of Civil Rule 12(f), which exists to prevent parties from including  
 3 “immaterial, impertinent, or scandalous” information in the pleadings—exactly what the FTC  
 4 has done here.

5 Specifically, Amazon moves to strike ¶¶ 218–41 of the Complaint, including the headers  
 6 accompanying these paragraphs.

## 7 II. BACKGROUND

8 The FTC filed its Complaint on June 21, 2023. ECF No. 1. The Complaint asserts three  
 9 causes of action for violations of the Restore Online Shoppers’ Confidence Act (“ROSCA”) and  
 10 one cause of action for violation of Section 5 of the FTC Act. *See* Compl. at ¶¶ 249–66. Each  
 11 cause of action relates exclusively to the sign-up and cancellation processes for Amazon Prime.

12 The Complaint contains two categories of “immaterial, impertinent, or scandalous”  
 13 allegations that should be struck under Rule 12(f). *First*, although the FTC’s causes of action  
 14 concern only Amazon Prime, the Complaint contains three paragraphs regarding other Amazon  
 15 subscription programs, including Audible, Kindle Unlimited, Amazon Music Unlimited, and  
 16 Subscribe & Save. Compl. at ¶¶ 218–20. These programs are wholly unrelated to Prime; they  
 17 offer goods and services ranging from audiobooks to discounts for recurring purchases but do not  
 18 relate to Prime benefits. Those conclusory paragraphs contain no substantive allegations and do  
 19 not identify any specific design element—much less one that the FTC alleges violates a law.

20 *Second*, the Complaint contains nearly eight pages of allegations detailing perceived  
 21 issues from the pre-suit investigation that the FTC (1) never sought to remedy during the  
 22 investigation and (2) do not pertain to any of the claims or requests for relief in this case. For  
 23 example:

24 • The FTC faults Amazon for exercising its right to file a Petition to Quash certain  
 25 Civil Investigative Demands (“CIDs”) and accuses Amazon of not identifying  
 26 relevant custodians and withholding documents during the investigation. Compl.  
 27 at ¶¶ 225–41. These allegations are demonstrably false: Amazon worked

1 cooperatively with FTC staff during the entirety of the investigation—ultimately  
 2 making numerous productions comprising tens of thousands of pages—and  
 3 reasonably exercised its right to file a petition to quash when the FTC imposed  
 4 impossible deadlines for complying with abrupt demands for an immense volume  
 5 of information. In any event, these accusations have nothing to do with the FTC’s  
 6 claims in this case.

7 • The FTC alleges that Amazon mislabeled documents as privileged to prevent their  
 8 disclosure. *Id.* at ¶¶ 221–24. These allegations are also demonstrably false:  
 9 Amazon conducted a diligent review of the documents it produced and asserted its  
 10 privileges through multiple detailed privilege logs without issue. But again, these  
 11 inflammatory and irrelevant allegations have no bearing on the claims alleged in  
 12 the Complaint.

13 These allegations have no bearing on any contested issues in the case, and as a result  
 14 Amazon will never have an opportunity to refute or disprove them. Instead, these irrelevant  
 15 attacks on Amazon’s other subscription services, its response to a government investigation, and  
 16 its reputation generally will remain an unchallenged part of a public legal accusation: an injury  
 17 that Rule 12(f) aims to prevent. These meritless allegations serve no purpose other than to smear  
 18 Amazon, prejudice the trier of fact, and thereby slant this case against Amazon through  
 19 allegations that have no bearing on whether its Prime service violated the law.

20 **III. ARGUMENT**

21 Under Rule 12(f), courts may strike complaint allegations that are “immaterial,  
 22 impertinent, or scandalous.” Fed. R. Civ. P. 12(f). Courts routinely invoke this rule to strike  
 23 “factual allegations that have no connection to plaintiff’s causes of action,” *Pierre v. Nicoll*,  
 24 2013 WL 5402088, at \*4 (N.D. Cal. Sept. 25, 2013), but instead are designed “solely to  
 25 prejudice [the defendant] by painting it as a bad actor,” *Beasley*, 400 F. Supp. 3d at 963.

26 Allegations are “immaterial” when they have “no essential or important relationship to  
 27 the claim for relief” and are “impertinent” when they “consist[] of statements that do not pertain,

1 and are not necessary, to the issues in question.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527  
 2 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994). “Scandalous matter improperly  
 3 casts a derogatory light on someone.” *Beasley*, 400 F. Supp. 3d at 962 (internal quotation  
 4 omitted). Here, the Complaint contains irrelevant and highly prejudicial allegations that satisfy  
 5 all three of these elements and therefore should be stricken under Rule 12(f). In particular,  
 6 Amazon seeks to strike: (1) allegations related to subscription programs other than Amazon  
 7 Prime; and (2) allegations related to the FTC’s investigation, including Amazon’s handling of  
 8 potentially privileged documents and disputes regarding discovery and other procedural matters.

9                   **A. Improper Allegations Related to Non-Prime Subscription Programs Should  
 10 Be Stricken.**

11                   The Complaint contains a few isolated references to Amazon’s other subscription  
 12 services and gratuitous, conclusory comments about their respective design elements. Compl. at  
 13 ¶¶ 218–20. But those other subscription services are not at issue in this case—the Complaint  
 14 does not contain *any* claims relating to those services and there are no corresponding substantive  
 15 allegations or requests for relief. Put simply, the stray references to Amazon’s other subscription  
 16 programs are completely unmoored from the rest of the Complaint, and serve no purpose. There  
 17 is no basis for including these programs in the Complaint and should be stricken. *See, e.g.*,  
 18 *Cooksey v. Ocean*, 2017 WL 11631497, at \*2 (C.D. Cal. Apr. 26, 2017) (striking various claims  
 19 because they were unrelated to Plaintiff’s cause of action for libel); *SST Sterling Swiss Trust  
 20 1987 AG v. New Line Cinema Corp.*, 2005 WL 6141290, \*5 (C.D. Cal. Oct. 31, 2005) (striking  
 21 allegations because they were irrelevant and because they were likely to “cast a cruelly  
 22 derogatory light” on defendants).

23                   The FTC’s conclusory allegations regarding other Amazon subscription services are  
 24 irrelevant to their claims regarding the Prime program, and their inclusion serves only to  
 25 prejudice Amazon and cast the company as a whole in a derogatory light. *See Beasley*, 400 F.  
 26 Supp. 3d at 963 (striking allegations designed “solely to prejudice [the defendant] by painting it  
 27 as a bad actor”); *Mireskandari v. Daily Mail & General Trust PLC*, 2013 WL 12129642, at \*5

1 (C.D. Cal. July 31, 2013) (“Because plaintiff does not allege a cause of action based on this  
 2 purported conduct, the allegations are immaterial and impertinent.”). Amazon thus respectfully  
 3 requests that these immaterial and prejudicial allegations be stricken.

4 **B. Improper Allegations Related to Irrelevant Investigation Conduct Should Be  
 5 Stricken.**

6 The Complaint includes extended passages focusing exclusively on irrelevant issues that  
 7 arose during the investigation that preceded this lawsuit. For example, the Complaint includes  
 8 multiple paragraphs related to Amazon’s treatment of privileged documents (Compl. ¶¶ 221–24),  
 9 as well as allegations regarding the FTC’s relationship with Amazon’s external counsel during  
 10 the course of the FTC investigation (*id.* at ¶¶ 225–241). These allegations are false, meritless,  
 11 and have nothing to do with the FTC’s claims in this lawsuit—which is about Amazon Prime’s  
 12 sign-up and cancellation processes.

13 None of the substantive claims or requests for relief are impacted by the FTC’s spurious  
 14 allegations, and the Court will not need to decide these questions that pertain to an already-  
 15 concluded investigation. The allegations regarding those issues thus serve no purpose other than  
 16 to attract attention and malign Amazon and its counsel, which is plainly an improper purpose.

17 *See Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (detailing  
 18 several “improper purposes” for court filings, including “gratify[ing] private spite” and  
 19 “promot[ing] public scandal”). Courts recognize that allegations like those included by the  
 20 FTC—related to purportedly insufficient document productions or claims of attorney-client  
 21 privilege—are legally irrelevant and, oftentimes, are purposefully used to raise an unfair specter  
 22 of impropriety. *See, e.g., Yue v. Chordiant Software, Inc.*, 2010 WL 11575579, at \*4 (N.D. Cal.  
 23 Apr. 22, 2010) (excluding “any presentation of evidence or line of questioning designed to show  
 24 Defendant’s assertion of the attorney-client privilege,” as such evidence can “serve no relevant  
 25 purpose” and could lead to the unduly prejudicial inference “that Defendant was improperly  
 26 withholding evidence”); *California Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 217 F.  
 27 Supp. 2d 1028, 1033 (C.D. Cal. 2002) (concluding that “[t]he possibility that issues will be

1 unnecessarily complicated or that superfluous pleadings will cause the trier of fact to draw  
 2 unwarranted inferences at trial is the type of prejudice that is sufficient to support the granting of  
 3 a motion to strike") (internal quotation omitted).

4 Courts routinely strike similarly immaterial allegations. For example, in *Mireskandari*,  
 5 the court struck allegations regarding alleged conduct that *preceded* the events at issue in the  
 6 complaint, concluding that those allegations were "stale" and "too attenuated to be material or  
 7 pertinent." *See* 2013 WL 12129642, at \*5; *see also Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d  
 8 986, 1001–02 (N.D. Cal. 2020) (striking allegations concerning conduct that post-dated the  
 9 events at issue as "immaterial and impertinent"); *Messer v. Portland Adventist Med. Ctr.*, 707 F.  
 10 Supp. 449, 451 (D. Or. 1989) (striking allegations regarding "actions which occurred before or  
 11 after" the events giving rise to the substantive claims at issue, which are "unrelated" and  
 12 therefore "not relevant" to the claims). Similarly, in *Resh, Inc. v. Skimlite Manufacturing Inc.*,  
 13 the court struck irrelevant allegations concerning "Plaintiff's extensive pre-suit negotiations with  
 14 Defendants," concluding that those allegations were "immaterial surplusage" to Plaintiffs'  
 15 substantive claims and requests for relief. *See* --- F. Supp. 3d ---, 2023 WL 2744423, at \*6 (N.D.  
 16 Cal. March 31, 2023). And in *Beasley*, the court struck "allegations of misconduct" that did not  
 17 "relate to Coffee-mate, the only product at issue." 400 F. Supp. 3d at 963. This Court should do  
 18 the same.

#### 19 IV. CONCLUSION

20 For the foregoing reasons, the Court should grant Amazon's motion to strike the  
 21 impertinent and irrelevant allegations regarding Amazon's designation of privileged materials,  
 22 historical events during the FTC's investigation, and programs other than Prime.

23 DATED this 17th day of July, 2023.

24  
 25 I certify that this memorandum contains 1,831 words, in compliance with the Local Civil  
 26 Rules.  
 27

DAVIS WRIGHT TREMAINE LLP

1 By s/ Kenneth E. Payson

2 Kenneth E. Payson, WSBA #26369  
3 James Howard, WSBA #37259  
4 920 Fifth Avenue, Suite 3300  
5 Seattle, WA 98104-1610  
6 Telephone: (206) 622-3150  
7 Fax: (206) 757-7700  
8 E-mail: kenpayson@dwt.com  
9 jimhoward@dwt.com

10 COVINGTON & BURLING LLP

11 Stephen P. Anthony\*  
12 Laura Flahive Wu\*  
13 Laura M. Kim\*  
14 John D. Graubert\*  
15 850 Tenth Street, NW  
16 Washington, DC 20001  
17 Telephone: (206) 662-5105  
18 E-mail: santhony@cov.com  
19 lflahivewu@cov.com  
lkim@cov.com  
jgraubert@cov.com

20 John E. Hall\*  
21 415 Mission Street, Suite 5400  
22 San Francisco, CA 94105  
23 Telephone: (415) 591-6855  
24 E-mail: jhall@cov.com

25 Megan L. Rodgers\*  
26 3000 El Camino Real  
27 Palo Alto, CA 94306  
Telephone: (650) 632-4734  
E-mail: mrodders@cov.com

28 HUESTON HENNIGAN LLP

29 John C. Hueston\*  
30 Moez M. Kaba\*  
31 Joseph A. Reiter\*  
32 523 West 6th Street, Suite 400  
33 Los Angeles, CA 90014  
34 Telephone: (213) 788-4340  
35 E-mail: jhueston@hueston.com  
36 mkaba@hueston.com  
37 jreiter@hueston.com

38 \*admitted pro hac vice

39 Attorneys for Defendant  
40 AMAZON.COM, INC.